**Ingram Book Company, a Division of Ingram Industries, Inc. *and* Cynthia Denise Potts.** Cases 5–CA–23543 and 5–CA–24379

October 31, 1994

## DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

This case presents the issue of whether the judge correctly found that the Respondent's officials committed several violations of Section 8(a)(1) of the Act.[1] The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Ingram Book Company, a Division of Ingram Industries, Inc., Petersburg, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] On June 29, 1994, Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

*Lynette K. Zuch, Esq.*, for the General Counsel.
*James P. Thompson, Esq.* and *Rhea E. Garrett II, Esq.*, for Ingram Book Company.

## DECISION

### STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This proceeding was litigated before me at Petersburg, Virginia, on May 3, 1993, pursuant to charges filed on May 14, 1993, and May 2, 1994, by Cynthia Denise Potts and complaints issued on April 15 and May 2, 1994, alleging Ingram Book Company, A Division of Ingram Industries, Inc. (the Respondent) has violated Section 8(a)(1) of the National Labor Relations Act (the Act) in several respects. Respondent denies it has violated the Act.

On the entire record, and after considering the able posttrial briefs filed by the parties and the demeanor of the witnesses appearing before me, I make the following

### FINDINGS OF FACT

#### I. BUSINESS OF THE RESPONDENT

The Respondent is a corporation with an office and place of business in Petersburg, Virginia, where it is engaged in the nonretail sale and distribution of books and related products. During the 12-month period preceding the issuance of each complaint in this proceeding, the Respondent, in the course of its business operations described above, purchased and received at its Petersburg facility products, goods, materials, and supplies valued in excess of $50,000 directly from points outside the State of Virginia. At all times material to this proceeding, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. PRELIMINARY ISSUES

The complaint in Case 5–CA–23543 issued on September 30, 1992. It was amended on April 15, 1994, to allege the maintenance of an unlawfully broad no-distribution rule. The Respondent then filed a motion to dismiss certain portions of the complaint, as amended, including the unlawful rule allegation. By order of April 29, 1994, I granted the motion to dismiss the unlawful rule allegation because there was no showing of a factual nexus between that allegation and the charge, citing *Nippondenso Mfg. U.S.A.*, 299 NLRB 545 (1990), and denied the motion to dismiss the complaint in all other particulars. On May 2, 1994, Potts filed a new charge in Case 5–CA–24379 alleging the maintenance of the rule to be violative of Section 8(a)(1) of the Act. General Counsel on the same day issued a complaint so alleging. I granted General Counsel's motion to consolidate the two cases for hearing over Respondent's objection.

Respondent argues that the complaint in Case 5–CA–24379 should be dismissed because it was solicited by the General Counsel. Counsel for the General Counsel stated on the record that she advised Potts of my dismissal of the unlawful rule allegation and her right to file a new charge thereon, whereupon Potts did so. From this, Respondent deduces that General Counsel engaged in conduct prohibited by General Counsel's Casehandling Manual and the Act. Respondent's contention that the Casehandling Manual has been violated by the General Counsel is a personnel matter to be dealt with by the General Counsel, and is not an issue of the complaint before me. On the evidence before me, I cannot conclude General Counsel acted improperly in advising Potts of her right to file a new charge. Respondent's motion to dismiss the complaint in Case 5–CA–24379 is denied.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. *The No-Distribution Rule*

Respondent distributes an Ingram Associates Handbook to each employee[1] as its preface shows. The rule in question reads:

> Associates are not permitted to distribute literature such as brochures, booklets, pamphlets, or flyers at any time except during Company-authorized fund-raising drives.

[1] The Respondent refers to its employees as associates.

General Counsel contends the rule is too broad and its maintenance violates the Act. Respondent argues: (1) there is no evidence Potts knew the rule was in effect after her departure from employment in March 1993; (2) there is no proof any employee was aware of or admonished under the rule; and (3) the following provision in the handbook renders the rule void and ineffective if it violates the Act:

> To the extent any policy may conflict with state or federal law, the Company will abide by the applicable state or federal law.

The rule is, prima facie, too broad and presumptively invalid, *299 Lincoln Street, Inc.*, 292 NLRB 172, 186 (1988); *Our Way, Inc.*, 268 NLRB 394 (1983). Its mere maintenance carries with it a possibility of enforcement against statutorily protected activity, and therefore reasonably tends to interfere with, restrain, and coerce Respondent's employees in the exercise of their right to engage in such activity. *Blue Cross-Blue Shield of Alabama*, 225 NLRB 1217, 1220 (1976); *Brunswick Corp.*, 282 NLRB 794, 795 (1987); *299 Lincoln Street*, supra.

Whether or not Potts knew of the no-distribution rule when she left Respondent's employ is irrelevant, but it would seem likely that she and others were aware of the rule because it appears in a handbook specifically designed for and distributed to them, as its introductory page indicates. That no one was admonished for violations of the rule, if that in fact be the case, is irrelevant because it is unlawful maintenance of the rule, not enforcement of it, that is alleged. The savings clause upon which Respondent relies is also a slim reed to lean on. It is designed to protect the Respondent, not its employees. There is no way an employee is likely to know if any of the handbook provisions run afoul of some law or other unless the employer so advises him or her. Respondent makes no claim and advances no probative evidence it advised its employees the no-distribution rule was unlawful and/or void. In the absence of such notification the employees have no reason to know the rule is unlawful.[2] The Board has consistently required employers to rescind and notify all its employees of the rescission of no-distribution rules when it has found the rules to be unlawful. See, e.g., *299 Lincoln Street*, supra. The unlawful maintenance of the rule here in question violates Section 8(a)(1) of the Act, and I shall recommend the usual remedy.

### B. *Other Allegations in Chronological Order*

On or about December 21, 1992, Potts and other employees met with Charles J. Pierce, then Respondent's vice president of operations at the Petersburg facility, and the Respondent's senior vice president of operations Lavona Russell and voiced their concerns about Respondent's hiring and promotion practices, supervisors showing favoritism to certain employees, plant temperature control, and other job related matters. Only Potts and Pierce testified concerning this meeting. Potts is credited[3] that she advised Russell she wanted to be treated fairly and would try to work with Respondent, but would go to the Labor Board if there was no action taken on the matters she and the other employees complained of. Russell urged Potts not to go to the Labor Board. Pierce's testimony that the Labor Board was not mentioned is not credited. I do not believe Potts deliberately concocted the rather detailed and plausible course of events she described, and she is credited except where specifically otherwise stated.

Later, on January 7, 1993,[4] Potts and other employees met with Respondent's vice president of human resources, Terry Cook. Cook solicited their problems and was told of employee dissatisfaction with their supervisors, working conditions, promotion policy, and other matters. After this meeting, Potts arranged an employee meeting for later in January with the president of the Dinwiddie[5] Civic League with the aim of securing the Civic League's support for the employees' requests made to Respondent.

Potts met privately with Cook in the Company's conference room on January 12. The two generally agree that they discussed the fact she had been denied a promotion, the possibility there were racial problems, and various other items of interest. Cook recalls that at some point in their conversation Potts asked if Respondent's move to Petersburg from another city was due to union activity at the other facility. Cook says he denied that was the case, and the subject of National Labor Relations Board or unions never came up again. Potts relates an entirely different scenario with respect to her conversation with Cook concerning the Board and unions. Her testimony was convincing and is credited over Cook's denials. Accordingly, I find that after some discussion on other matters, Cook asked why she would go to the Labor Board. She replied she was tired of people telling her she could leave if she was not happy. Cook asked if Potts thought a union was necessary. Receiving an affirmative reply from Potts with reasons therefor, Cook ventured that Respondent did not want or need a union and if Potts was unhappy it would be best if she left the Company. He further advised Potts she could be fired for any or no reason, only the Company could enforce their rules, and nobody could make the Respondent do anything. Cook further warned that if Potts was thinking about forming a union, she should leave it alone. Here we have a high-ranking company official (1) privately interrogating an employee concerning her union sympathies, (2) following up with a statement the Respondent did not need or want a union, with the ominous advice it would be better for Potts to quit if she was unhappy, (3) telling her she could be fired for any or no reason, and (4) warning her to leave union activity alone. By so doing, Cook, a high-ranking company official sitting in a locus of authority, violated Section 8(a)(1) of the Act[6] by coercively

[2] Rank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint.

[3] Potts, although I do not credit all her testimony, was more believable than Pierce and seemed certain and convinced of the truth of her testimony. Pierce's testimony was not as impressive.

[4] All dates hereafter are 1993 unless otherwise stated.

[5] Dinwiddie, Virginia, is a small community near Petersburg, Virginia.

[6] In all these instances I have applied the time-honored test of whether the conduct at issue had a reasonable tendency, viewed objectively, to interfere with, coerce, or restrain an employee in the ex-

interrogating an employee concerning her union sympathies; by telling Potts it would be better that she quit if she was unhappy hard on the heels of his advice no union was wanted or needed;[7] warning her how easy it would be to fire her, and by so warning her conveying a threat of discharge if she engaged in prounion activity; and by the additional warning to leave union activity alone, which conveyed the same message.

Herman Hannon was employed by the Respondent from April 1992 to March 1, 1993, as a stocker, on February 1 he was called into the office for a private meeting with manager of human resources, Gunner Melder.[8] Hannon had met with Melder on several previous occasions where the same procedure, if not the content, was followed. The conversation opened with Melder asking how everything was going. Hannon told him a lot of employees were unhappy with Respondent's failure to promote part-time employees who were qualified. Melder then asked if Hannon knew anything about a meeting the prior week. Receiving a negative answer, Melder pressed on, stating he had heard employees had met with the Dinwiddie Civic League to discuss their complaints about company related matters and things that had taken place at Respondent's facility. He then asked if there were a lot of attendees at the meeting with the Dinwiddie Civic League. Hannon denied any knowledge of the meeting. Melder persisted by asking whether Hannon thought there were 30–35 employees there. Hannon again replied he did not know. Switching courses, Melder asked what Hannon thought could be done to improve things in the warehouse. Hannon suggested an evaluation and possible changes of supervision. The meeting closed with Melder asking Hannon to let him know if Hannon heard of any meetings or anything similar going on. Hannon agreed to do so.

General Counsel alleges that Melder during this meeting violated Section 8(a)(1) of the Act because he (a) interrogated an employee about the employee's union activities and protected concerted activities, and the union activities and protected concerted activities of other employees; (b) solicited employee complaints and grievances; and (c) asked an employee to ascertain and disclose to Respondent the union activities and protected concerted activities of other employees. Melder was obviously aware the employees had sought help concerning their work related complaints from the Dinwiddie people. By so doing, the employees were engaged in protected concerted activity. Melder's questions were directed at ascertaining how many of Respondent's employees were engaged in such activity, and, by questioning Hannon about the meeting, Melder was in fact interrogating him as to whether he had been one of the attendees. Questioning of this nature by a high-level company official in the privacy of the Company's office is coercive and violates Section 8(a)(1) of the Act.[9] Similarly, the exacting of Hannon's promise to inform Melder if there were other union meetings was an unlawful solicitation of an employee to act as a company spy on statutorily protected employee activity and thus violated Section 8(a)(1) of the Act. I do not agree with General Counsel that an unlawful solicitation of complaints and grievances took place. Hannon had previously had many meetings with Melder wherein Melder asked him how things were going, and had solicited Melder's suggestions just like he did in this meeting. This seems to have been a company practice totally unconnected to the presence of protected employee union activity. Moreover, there is no indication Melder expressly or impliedly promised to correct problems raised by Hannon.

On April 8, Potts and a fellow employee placed fliers on cars parked in the Respondent's lot. The fliers read as follows:

ATTENTION!
ALL INGRAM ASSOCIATES
INTERESTED IN FORMING A UNION
PLEASE MEET SATURDAY, APRIL 10, 1993
AT 12:00 NOON
AT THE MCDONALDS ON ROUTE 1
DINWIDDIE, VIRGINIA

A company supervisor removed the fliers. Another employee replaced them on April 9. Vice President of Operations Pierce removed them.

On April 10, shortly before the appointed meeting time, Potts and several other employees gathered at McDonald's to wait for the arrival of union representatives. The restaurant is about a mile north of Respondent's plant, which is located on a street intersecting with Route 1. As the employees waited, Pierce drove by in a company vehicle. Potts first testified that Pierce, coming from the south, drove by, turned around, drove south, turned around somewhere and passed them again, going north, turned off on a side street north of McDonald's and later again came by them going south. On this passing, she called his name and Pierce waved. In sum, she testified Pierce made two round trips. On cross-examination, she recalled Pierce made three round trips and waved the second time he passed going south. She explains that the three round trips was what she described in her pretrial affidavit as six passings because Pierce went by six times. Employees Dulcey McCadden and Charlene Miller testify they saw Pierce drive by them going south, then saw him pass going north and return going south. Both recall Potts waving and Pierce waving back the last time he passed them going south. This is consistent with Pott's testimony Pierce waved on his second southbound trip.

Pierce testified that he went to work at about 8:30 or 9 a.m. that Saturday, as he often does, to do paperwork. He recalls that at about 12:30 p.m. or so he drove by McDonald's going north to a Safeway grocery where he bought some chewing gum and a bottle of Snapple. Then he drove back south, passing McDonald's enroute to the plant. He states he saw no employees at McDonald's and did not wave. His reason for going to the Safeway store was it was lunchtime and he wanted a large bottle of Snapple, which was not available at the plant.

Pierce acknowledges he made one round trip passing of the McDonald's restaurant. Potts claims he made three. McCadden and Miller, both of whom were impressive and believable witnesses, recollect he made 1–1/2 round trips. Noting that the trips north were on the far side of the road

ercise of the rights guaranteed him or her by Sec. 7 of the Act. See, e.g., *G. H. Hess, Inc.*, 82 NLRB 463 fn. 3 (1949).

[7] *Intertherm, Inc.*, 235 NLRB 693 fn. 6 (1978).

[8] Melder is no longer an employee of Respondent and did not testify. Hannon's uncontroverted account of what transpired during the meeting is believable and is credited.

[9] I do not find Melder was asking about union activity.

from McDonald's, it is not improbable that McCadden and Miller did not have their attention drawn to Pierce until he passed by them going south on the McDonald's side of the road. The three women are credited that Pierce did in fact wave at them as he passed going south. On the whole, I am persuaded that there were two round trips, the first trip originating at the plant, going north past McDonald's, returning past McDonald's going south, then another round trip coming from the south and returning from the north at which time Pierce waved as he passed. It may be that Pierce bought a bottle of Snapple on one of the two round trips, but he certainly did not need two trips to do it. I do not believe that was his purpose in driving past McDonald's, and his version of events is not credited. This factor, plus Respondent's hostility toward employee union activities as expressed by Vice President Cook to Potts and Manager Melder's particular interest in knowing what employees were doing when they gathered together, persuades me that Pierce was indeed interested in the identity of employees attending the union gathering and sought to find out who and how many attendees there were by engaging in surveillance of those employees gathered in the McDonald's lot. Surveillance of employees holding a union meeting violates Section 8(a)(1) of the Act, and Pierce did so here. *Action Auto Stores*, 298 NLRB 875, 887 (1990).

## CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent has violated Section 8(a)(1) of the Act by the following conduct.

(a) By maintaining an unlawfully broad no-distribution rule.

(b) By coercively interrogating employees concerning their union and protected concerted activities and those of others.

(c) By threatening an employee with discharge if she engaged in union activities.

(d) By soliciting an employee to report on the protected concerted activities of others.

(e) By engaging in surveillance of a union meeting attended by its employees.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

## ORDER

The Respondent, Ingram Book Company, a Division of Ingram Industries, Inc., Petersburg, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an unlawfully broad no-distribution rule.

(b) Interrogating employees concerning their union and protected concerted activities and those of others.

(c) Threatening employees with discharge if they engage in union activities.

(d) Soliciting employees to report on the protected concerted activities of other employees.

(e) Engaging in surveillance of employee union meetings.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remove the no-distribution rule from its Ingram Associates Handbook and advise its employees in writing that this has been done.

(b) Post at its place of business in Petersburg, Virginia, copies of the attached notice marked ''Appendix.''[11] Copies of notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain unlawfully broad no-distribution rules.

WE WILL NOT threaten employees with discharge if they engage in union activities.

WE WILL NOT coercively interrogate employees concerning their union and protected concerted activities or those of others.

WE WILL NOT engage in surveillance of employee union activities.

WE WILL NOT solicit employees to report on the protected concerted activities of other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind and remove the following language from item 9. Solicitation appearing at page 22 of the Ingram Associates Handbook, and advise you in writing that this has been done and that the following no-distribution rule is no longer in effect:

Associates are not permitted to distribute literature such as brochures, booklets, pamphlets, or flyers at any time except during Company-authorized fund-raising drives.

INGRAM BOOK COMPANY, A DIVISION OF INGRAM INDUSTRIES, INC.